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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

BOARD OF REGENTS OF STATE COLLEGES and ROGER E. GUILES,
Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief of the Board of Trustees of the California State Colleges as Amicus Curiae

I.

INTEREST OF THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE COLLEGES.

The Board of Trustees of the California State Colleges is the governing body for a statewide system consisting of nineteen separate campuses serving a total of approximately 263,000 students and employing a faculty of approximately 14,900.[1] Pursuant to legislative authorization

1. Including 3,700 part-time instructors.

the Board has adopted rules and regulations for the hiring, retention, and tenure of academic employees. The principles embodied in these rules have deep roots in academic tradition and experience, and, being of common or related origin with the tenure systems of most other public institutions of higher education in the United States, the principles followed in California are very similar to those which are in issue in this case. A decision by this Court affirming the holding of the Court of Appeals would have a direct, substantial, and immediate effect upon the California State Colleges in that it would require a complete revision of the rules and policies governing hiring, retention and tenure. The extent of the potential impact of the decision is perhaps best illustrated by the fact that 534 non-tenured faculty members in the California State Colleges were given notices of nonretention for the current academic year and thus are in a position to assert whatever rights the Court holds may be asserted by the respondent here.

II.

IMPORTANT VALUES ARE PUT IN JEOPARDY BY THE CIRCUIT COURT'S DECISION.

Important values which are put in jeopardy by the Circuit Court's decision are the following:

(1) A college or university should have the maximum flexibility and maximum freedom to hire new faculty on a fully probationary basis without making any long term commitment to the probationer.

(2) Tenure should be accorded only to an individual who has earned it by demonstrating not only that he is qualified scholastically and academically, but also that he is the best prospect available—i.e., that he has more potential for academic excellence than any other candidate or potential candidate.

(3) The obligation of the institution to provide its students, present and future, with the best instruction possible is paramount to the interest of the individual faculty member in retaining a specific position.

The decision of the Circuit Court, by imposing upon public colleges and universities a requirement that probationary employees be retained or given a statement of reasons for nonretention and an administrative hearing, will have the following detrimental results to the quality of public higher education:

(a) Employers will become more cautious and less likely to hire persons with innovative or unconventional ideas.

(b) Administrators will be required to assume the unfamiliar and unwelcome burden of documenting and justifying the often subtle and subjective judgments which go into retention and tenure decisions. The result will be that retention and tenure will be granted by default to individuals who have not in fact proved themselves deserving of it.

(c) The overall quality of instruction will suffer because appointments will be made according to criteria which place the individual faculty member's personal interests above the interests of the institution and its students.

III.

THE RULE OF CAFETERIA WORKERS v. McELROY CALLS FOR A BALANCING OF THE PUBLIC INTEREST IN MAINTAINING THE QUALITY OF PUBLIC HIGHER EDUCATION AGAINST THE INTEREST OF THE EMPLOYEE IN RETAINING A SPECIFIC JOB.

To determine what procedural protections, if any, are required when a college or university decides not to rehire a non-tenured teacher, it is necessary to weigh the interests of the institution against those of the employee. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886

(1961). As the Court pointed out in *McElroy*, there is no universally applicable constitutional requirement of notice and hearing in every instance where the interests of an individual may be impaired by governmental action: ". . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." 367 U.S. at p. 895. See also *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

The competing interests to be balanced in the present case are, on the one hand, that of the public in providing the best possible education to the students, both present and future, of public colleges and universities, and on the other, the interest of the individual teacher in retaining his position with the institution.

The discussion which follows will analyze each of these competing interests in turn, and will demonstrate that the decision of the Court of Appeals strikes the balance improperly by giving insufficient weight to the important public interests which are at stake.

IV.

THE TRADITIONAL APPROACH TO TENURE IS ESSENTIAL TO PRESERVE THE QUALITY OF HIGHER EDUCATION.

A. The Public Interest Is Paramount.

Public higher education exists for the students and for the general welfare of society at large, not for the faculty or for the benefit of the individual faculty member. A decision to award tenure necessarily involves a long term commitment on the part of the institution—a commitment which will directly affect the education of thousands of students and will involve the expenditure of hundreds of thousands of dollars. It is essential, therefore, that all such decisions be made with the utmost care to insure that the public interest in maintaining the quality of education is adequately protected.

B. The Distinction Between Probationary and Permanent Employment Is Important and Must Be Preserved.

Faculty members are appointed on a yearly basis and are subject to continual reevaluation until tenure is attained. Tenure, or permanent status, is gained after a probationer has served for a specified number of years, which varies from institution to institution but usually does not exceed seven years. After he has obtained tenure, the faculty member cannot be terminated except for cause and after a hearing.

Essential to the tenure system is the time honored concept that a probationary employee must prove himself by his performance. He is entitled to no presumption of competence, and until tenure is granted the college assumes no burden of establishing cause for termination of the employment relationship. Also according to the traditional principles, the college remains free during the employee's probationary period to search for better qualified personnel. Even if the probationer's performance is entirely adequate, the college remains obligated to hire teachers who appear to have greater potential, if they are available. Only the probationer who proves himself equal or superior to the competition deserves to be awarded the valuable rights and privileges which tenure confers.

The principles of the tenure system, as described above, have been developed over the years through participation by faculty and administrators. They represent what has been found through experience to be best suited to the academic community and best for maintaining the quality of higher education. Moreover, the tenure system itself provides substantial protection from arbitrary action, a feature which was completely overlooked in the decisions of the District Court and the Court of Appeals in this case.

C. The Probationary Process Contains Built-in Protection Against Arbitrary Action.

The process for determining whether to reappoint a probationary faculty member, or to award him tenure, begins with recommendations from the faculty member's colleagues in his department and proceeds through the department chairman and various administrators and college committees, the practice varying somewhat among institutions. Normally, the recommendations from each level are received by the president or the governing board who make the ultimate decision upon the basis of the reports and recommendations which are received from all levels of the college. This process is typical in institutions of public higher education throughout the United States and by its very nature contains built-in checks and balances against unfair treatment. The protection thus provided is real and substantial. The multi-faceted nature of the process serves as a check against arbitrary action by any one individual since his recommendation is only one among many, and because each recommendation is subject to scrutiny at other levels.

In addition, many institutions provide further appeals of a formal or informal nature. In some colleges, procedures are available for the faculty member to meet with the committees or administrators who have made negative recommendations in order to attempt to convince them to change their recommendations. In the present case, the faculty member had the right to appeal to the Board of Regents, although he chose not to take advantage of the opportunity.

D. A Requirement That a Probationary Faculty Member Be Given a Statement of Reasons and a Hearing Is Incompatible with the Tenure Concept.

The tenure system is founded upon the rule that until a person obtains tenure no reason need be given for the

decision not to retain him, and after he has tenure he may be dismissed only for "cause" and after a hearing. The Circuit Court decision presently under review undermines this principle by requiring the institution to produce a statement of the reasons for nonretention and to provide a hearing at which the validity of those reasons may be tested.

Both the District Court and the Court of Appeals attempted to preserve the distinction between probationary and tenured faculty by stating that the "cause" traditionally required for dismissal of a tenured faculty member is not required for the decision not to retain a probationary faculty member. Instead, the opinions state that a "considerably less severe" standard is to be applied. *Roth v. Board of Regents*, 446 F.2d 806 at p. 808 (7 Cir. 1971); 310 F.Supp. 972 at p. 979 (W. D. Wisc, 1970).)

The distinction which the lower courts thus attempt to draw between "cause" and something less than "cause" will prove unworkable in practice. As a result, "cause" inevitably will become the standard for nonretention of probationary faculty. The reasons for this are several. Although presumably the customary "subtle" bases for nonretention would still be legally acceptable (*Roth v. Board of Regents*, 446 F.2d 806 at p. 809 (7 Cir. 1971)), the court's holding gives insufficient weight to the practical difficulty of producing a written statement verbalizing these considerations. Such "subtle" reasons are in fact difficult to put into a written charge, because they depend so much on subjective evaluation of such matters as the probationer's rapport with his colleagues and students, his creativity, diplomacy, his mastery of his field of study, and other intangible qualities. See *Drown v. Portsmouth School Dist.*, 435 F.2d 1182, 1184 (1 Cir. 1970), *cert. denied* 91 S.Ct. 1659 (1971); *Developments in the*

Law—Academic Freedom, 81 HARV. L. REV. 1045, 1101 (1968).

The natural tendency, then, will be to avoid the troublesome task of articulating subtle and subjective reasons and to search for objective factors which are more easily described—factors such as those which might constitute "cause" for dismissal of a permanent employee. When no objective cause can be found, the tendency will be to withhold adverse comment entirely and recommend in favor of retention.

In addition, faculty members who evaluate probationers are not administrators and generally will not have the administrative skills required to make proper written reports of their evaluations of probationary employees. The knowledge that he will later be called upon to defend his reasons at a hearing predictably will have a chilling effect on the individual making the evaluation, and will lead him to shun making negative recommendations except where the probationer has done something patently and objectively wrong.

Once the institution is required to give a statement of reasons, the inevitable tendency will be to look to the institution to support those reasons and carry the burden of proving them. In addition, the confusion caused by having two similar but subtly different sets of rules and procedures, one for probationary and one for tenured employees, is likely to lead to misunderstandings and administrative difficulties. The tendency will be to avoid application of two different criteria and administration of two different standards and procedures, and to treat all employees in a similar manner.

For the above reasons, the distinction between tenured and probationary faculty is likely to be obliterated, and ultimately "cause" will be required for nonretention as

well as dismissal. The effect will be to eliminate the probationary process and the important benefits which historically have been derived from its maintenance. See *Freeman v. Gould Spec. School Dist.*, 405 F.2d 1153, 1160 (8 Cir. 1969), *cert. denied* 396 U.S. 843 (1969).

Requiring a statement of reasons and a hearing will not only cause reluctance to make negative decisions once the person is employed, it also will tend to inhibit the employment of persons of unusual or non-conforming background. The administrator who knows that it will be difficult to terminate a professor once he is employed will not be inclined to take a chance on someone who does not conform to accepted standards, whether by reason of academic training, personality, or philosophy. Inevitably, these two natural and predictable forces will combine to produce a homogeneous faculty composed of individuals who have received tenure not because they have proved themselves to be superior scholars and teachers, but because the institution was unable, or unwilling, to prove they were not. *Drown v. Portsmouth School Dist.*, 435 F.2d 1182, 1186 (1 Cir. 1970), *cert. denied* 91 S.Ct. 1659 (1971).

The tradition of faculty participation in decision making creates additional obstacles to the preparation of written statements of reasons for nonretention. As discussed earlier, the decision not to reappoint is not normally made by one person, but is the result of a consensus, including evaluations by departmental colleagues, the department chairman, and other groups and individuals in the college. It is rare, therefore, that there is only one reason for nonretention. Each person making an evaluation may have a different reason, and one or all may not be willing to subscribe to the other's report. Meetings and conferences frequently will be required in order to attempt to

reach agreement upon the content and wording of a written statement, and this added burden will have a further tendency to inhibit the making of negative recommendations in difficult cases.

E. The Requirement of a Hearing Will Impose a Heavy and Unnecessary Burden Upon the Institution.

It is common knowledge that educational institutions everywhere are operating under severe financial restrictions. Any added administrative burden, such as the hearing requirement imposed by the Circuit Court's decision, will necessarily reduce the amount of resources available for the primary function of the institution—that of educating its students.

In addition, the requirement of a hearing could result in removing the decision making process from the faculty and college administrators to professional hearing officers. If a hearing is required by law, many probationers will wish to be represented by an attorney at the hearing. If this is permitted, it will be necessary for the institution also to employ an attorney to represent its interests. In this adversary context, the institution will be obligated to provide a legally trained hearing officer to hear the case, because lay persons, whether faculty or the governing board, ordinarily do not have the skills required to conduct a hearing where both parties are represented by counsel. *See, e.g., Fluker v. Alabama State Board of Educ.*, 441 F.2d 201, 203 (5 Cir. 1971), where a faculty committee declared itself unable to resolve issues raised by the attorneys representing the parties at the hearing.

There is reason to doubt that the administrative hearing required by the court below would be of any real value or benefit. As observed by Judge Duffy in his dissenting opinion, college hearing committees are not qualified to

pass upon questions of law (446 F.2d at p. 811). The probationer who is not successful at the college hearing, moreover, will insist upon receiving a de novo hearing in the courts, while the college will be bound by what it has done at the administrative level.

Academic values obviously will suffer if retention and tenure decisions are made by persons who do not have academic expertise. *Ferguson v. Thomas*, 430 F.2d 852, 856 (5 Cir. 1970). The only satisfactory solution is to permit the colleges to continue to perform the function of determining academic and scholastic qualifications without imposing upon them the burden of an administrative hearing. This solution is not incompatible with the established rule that the employee who feels he has been subjected to punitive action for his exercise of constitutionally protected rights may seek to establish his claim in the courts.

V.

THE INTEREST OF THE PROBATIONER DOES NOT MERIT THE REQUIREMENTS IMPOSED BY THE COURT OF APPEALS.

As demonstrated above, the interests of the institution, and the public, in continuing the present system are substantial. The lower court, however, considered the interest of the probationer more weighty. The court equated nonreappointment with refusal to grant a license to practice a profession (at p. 809), and concluded that the two situations call for similar due process protections. The court's conclusion, it is submitted, is not valid. The effect of nonretention on the individual's career is not as severe as the court suggested. He is not prevented from pursuing his career, as in the case of a failure to obtain a license. He is only foreclosed from one particular job. Secondly, he has not been fired for "cause", and nonretention does not imply that the faculty member has been found guilty

of misconduct or that his performance has been unsatisfactory.

In the administration of a college or university, it is frequently necessary to make personnel changes in order to achieve a better balance in the teaching staff of an academic department. Such changes may, and often do, require that notices of nonretention be given to non-tenured professors. Because such occurrences are common, it is understood among college administrators that nonretention by another institution does not imply unsatisfactory performance, and the fact that an applicant has not attained tenure elsewhere is no barrier to obtaining new employment.

It also is important to note that the faculty member is given notice of nonretention many months prior to the date the decision becomes effective. He thus has ample time to search for other employment.

The requirement of giving written reasons for the decision not to retain may have the very result that the lower court wished to avoid. If written reasons are required for nonretention in every case, these reasons may reflect adversely upon the probationer and their availability to other employers may make it difficult for him to obtain another position.

VI.

THE LOWER COURT DECISION IS CONTRARY TO CASE LAW.

The Circuit Court decision represents a departure from accepted principles of law which have been prescribed by this Court. In *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), the Court held that due process was not denied when an employee lost her job because she was summarily denied access to a government site on which she worked. The Court stated:

> "It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." (361 U.S. at 896).

The Court added that as far as the Constitution was concerned a public employee may be summarily discharged "at any time without giving the reason." (at 897). See also *Bailey v. Richardson*, 182 F.2d 46 at p. 57 (D. C. Cir. 1950) *affirmed* 341 U.S. 918 (1950).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court cited *Cafeteria and Restaurant Workers Union v. McElroy, supra*, with approval. The Court held in *Goldberg* that an evidentiary hearing is required prior to termination of welfare payments but specifically distinguished the termination of welfare from "the discharged government employee." (397 U.S. at p. 264).

The long accepted rule that probationary employment may be terminated for any reason and without a hearing, except that it may not be terminated for the exercise of constitutionally protected rights, has been followed by the federal and state courts in numerous cases which are discussed by counsel for petitioners. Amicus curiae wish, however, to bring to the Court's attention the recent decision of the California Supreme Court in *Bogacki v. Board of Supervisors*, 5 Cal. 3d 771, 489 P.2d 537 (1971). *Bogacki* involved a permanent county employee who claimed that he could not be discharged without "cause" and without a hearing. The California Supreme Court rejected this claim, stating:

> "A public employee serving at the pleasure of the appointing authority—whether he be a "permanent" employee in a non-civil-service county as in this case, a "provisional" employee in a civil service county [citation], or any other kind of public employee serv-

> ing on this basis—is by the terms of his employment subject to removal without judicially cognizable good cause. "Unquestionably, a broad discretion reposes in governmental agencies to determine which [such] employees they will retain. Considerations of comity and administrative efficiency counsel the courts to refrain from any attempt to substitute their own judgment for that of the responsible officials." (At p. 783)

Many of the cases which have been cited in support of the position of the respondent are not concerned with the rights of government employees, and therefore are not helpful in the consideration of this case. Those cases cited which do pertain to governmental employment are distinguishable, either because they involve a substantive determination that the employer unlawfully required the employee to waive constitutional rights as a condition of continued employment (*e.g., Wieman v. Updegraff*, 344 U.S. 183 (1952)), or because the government interest involved was so slight that it was entitled to no significant weight (*e.g., Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969)).

CONCLUSION

The decision in this matter by the Court of Appeals for the Seventh Circuit gives insufficient attention to two important considerations: (1) the public interest in maintaining the existing tenure system in order to protect the quality of public higher education, and (2) the fact that the probationary process is designed to afford the non-tenured teacher substantial protection against arbitrary treatment. Considering these factors, and balancing the competing interests of the public against those of the individual employee, it is respectfully submitted the Court should reverse the decision of the Court of Appeals and remand the case for further proceedings in the trial court as may be appropriate.

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